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In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-161

MARIANO A. ROMAGUERA, ET AL.,
PETITIONERS,

v.

AMECO CORPORATION, ET AL.,
RESPONDENTS.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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Blanchard Press, Inc., Boston, Mass. — Law Printers

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In the
Supreme Court of the United States

OCTOBER TERM, 1975

No.

MARIANO A. ROMAGUERA, ET AL.,
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v.

AMECO CORPORATION, ET AL.,
RESPONDENTS.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Messers Mariano A. Romaguera, Jose Ramon Vendrell, Jr., Cesani Hardware, Inc., and Mayaguez Ready Mix Concrete, Inc., the petitioners herein, pray that a writ of Certiorari be issued to review the judgment of the United States Court of Appeals for the First Circuit in the above entitled case on March 12, 1975.

Opinions Below

The opinion of the First Circuit Court of Appeals for the First Circuit is unreported and is printed in Appendix "A" 2 hereto, *infra*, page 17 and is dated March 12, 1975. The judgment of Circuit Court of Appeals is printed in Appendix "A" 3 hereto, *infra*, page 21 and is dated March 12, 1975. A Petition for Rehearing was denied by the Circuit Court of Appeals on April 14, 1975. The order and memorandum of the First Circuit Court of Appeals denying rehearing is printed at page 22 of this Petition. The judgment of the United States Court for the District of Puerto Rico is printed in Appendix "A" 1 hereto, *infra*, page 12 and is dated January 21, 1974. On May 12, 1975 this Honorable Court granted an extension of time until July 31, 1975 to petition for Certiorari.

Jurisdiction

The judgment of the Circuit Court of Appeals was entered on March 12, 1975, *infra*, Appendix "A" 3, page 21. The jurisdiction of the Court if invoked under 28 U.S.C. #1254 (1), and under Section 24 of the Bankruptcy Act, (11 F.C.A. 47 (c)). The only right to review in the Supreme Court of a decision by the Court of Appeals is by Certiorari. (*Central Trust Co.* v. *George Lenders & Co.*, 239 U.S. 11, 60 L.Ed. 119; *William R. Staats Coin Security Trust Savings Bank*, 243 U.S. 121; 61 L.Ed. 632).

Questions Presented

One: Decision of the Lower Courts based on presumptions without any evidenciary hearing nor opportunity to be heard and present evidence to rebut such presumptions constitute a violation of the rights guaranteed by the Fifth Amendment of the Constitution of the United States.

Two: Decisions in the Lower Courts based on presumptions allowing a party a hearing to rebut such presumptions violates Rule 301 of the Federal Rules of Evidence.

Three: The Decisions of the United States Court of Appeals for the First Circuit sanctioned a departure from the accepted and usual course of judicial proceedings.

Fourth: The decision of the Circuit Court of Appeals for the First Circuit is in direct contradiction with the decisions of other Circuit Courts.

Statutes Involved

FIFTH AMENDMENT, UNITED STATES CONSTITUTION:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, *nor be deprived of life, liberty or property, without the due process of law;* nor shall private property be taken for public use without just compensation.

RULE 301, FEDERAL RULES OF EVIDENCE:

> "In all civil actions and proceedings not otherwise provided by Act of Congress or by these rules, a presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption, but does not shift to such party the burden or proof in the sense of the risk or nonpersuasion, which remains throughout the trial upon the party on whom it was originally cast."

SECTION 60 OF THE BANKRUPTCY ACT, Title 11, Sec. 96; Sub-Section II, Paragraph (8) (b):

> "Any such preference may be avoided by the trustee if the creditor receiving it or to be benefited thereby or his agent acting with reference thereto has, at the time when the transfer is made, reasonable cause to believe that the debtor is insolvent. Where the preference is voidable, the trustee may recover the property or, if it has been converted, its value from any person who has received or converted such property, except a bona-fide purchaser from or lienor of the debtor's transferee for a present fair equivalent value: Provided, however, That where such purchaser or lienor has given less than such value, he shall nevertheless have a lien upon such property, but only to the extent of the consideration actually given by him. Where a preference by way of lien or security title is voidable, the court may on due notice order such lien or title to be preserved for the benefit of the estate, in which event such lien or title shall pass to the trustee. For the purpose of any recovery or avoidance under this section, where plenary proceedings are necessary, any State court which would have had jurisdiction if bankruptcy had not intervened and any court of bankrnuptcy shall have concurrent jurisdiction."

Statement of the Case

On August the 6th 1970, the Bankrupt in the instant case filed a Petition in Bankruptcy under Chapter XI of the Bankruptcy Law with a financial statement attached from which it appears that at the time of the filing of the Petition, even though debtor was unable to pay his debts

as they became due, he was not insolvent as defined under Par. 19, Title 11, Sec. 1 of the Bankruptcy Law, because his assets were sufficient to pay his debts.

At the time the petition was filed, the herein appellants were the holders of mortgage notes in the original amount of $265,500.00, which mortgage, even though executed two years before the filing of the Petition in Bankruptcy, was presented for registration, and thus legally registered, within the 120 day period immediately before the filing of the said Petition in Bankruptcy.

On October 15, 1971, the Trustee in Bankruptcy filed a motion informing and requesting the Court to make a ruling as to whether the above described mortgage in favor of appellants, included in the plan of reorganization, should be treated as a secured or an unsecured credit.

Thereafter several motions and briefs were filed by both parties on whether or not the mortgage held by appellants constituted an illegal preference. Appellants took the position that they were entitled to plenary proceedings and that the Trustee had the burden of affirmatively proving all the essential elements of an illegal preference and that the recording of the mortgage within the 120 days period prior to the filing of the Petition in Bankruptcy was only one of such essential elements.

No plenary proceedings were ever filed by the Trustee; no evidentiary hearing of any kind was ever held; no evidence of any kind was ever offered to the lower Court, except for the Certificate issued by the Registry of Property of Mayaguez, from which appears the date of registration of the mortgage. To facilitate the determination by this Honorable Court of the fact that no evidentiary hearing was ever held, appellants requested and obtained from the Official Reporter of the Lower Court a Certificate of all appearances, either oral or in writing, made by appellants and/or their Counsel and said Certificate is

herein attached and identified as Exhibit 1. The certificate clearly proves that the final decision entered by the Lower Court was given without any hearings of any kind and without receiving any evidence to prove the essential elements of an illegal preference.

Without receiving evidence, on January the 21st 1974, the Honorable Judge of the U.S. District Court for the District of Puerto Rico, ignoring the fact that it was incumbent on the Trustee to prove the existence of an illegal preference, determined that appellants had failed to give a reasonable excuse for the late registration of the mortgage and denied the Motion filed by appellants dated October 29, 1973, a copy of which is attached and identified as Exhibit II, and consequently finding that the mortgage was an illegal preference and as such, an unsecured claim.

On appeal, the Circuit Court of Appeals for the First Circuit affirmed, stating that "July 31st is the relevant date as far as the mortgage is concerned, but there can be no doubt that, *in the absence of evidence to the contrary*, insolvency at the time of filing adequately *supports the inference* that the debtor corporations were insolvent one week earlier", thus, failing to consider that appellants were not given any opportunity to present said "evidence to the contrary". The Court further stated "There was also adequate support for the conclusion that at the time of the transfer appellants had reasonable cause to believe that the debtors were insolvents" basing said conclusion in that "The close proximity in time of the presentation of the mortgage and the filing of the petition, ... would be probative standing alone . . . ." again ignoring that no opportunity was given appellants to prove otherwise, and that such evidence is insufficient at law.

The other prerequisites to a voidable preference discussed by appellants were not even touched by the Court of Appeals.

IN THE MATTER OF CESANI HARDWARE, INC., AND MAYAGUEZ READY MIX CONCRETE, INC.

The appellants, CESANI HARDWARE, INC. AND MAYAGUEZ READY MIX CONCRETE, INC., requested the Lower Court merely to hear them on their contention that certain payments of interests made to Trust Mortgage Corporation as secured creditors should be declared unsecured. Regardless of the fact that according to the Law, payment of interests is generally considered and unsecured claim, without any hearing of any kind, and without giving the appellants any opportunity to either present proof or argue their contention, the Court dismissed the Motion dated December 11, 1972, a copy of which is attached and identified as Exhibit III.

The Circuit Court of Appeals for the First Circuit merely decided that the objection, made December 11, 1972, when a hearing having been November 10, 1972, was not timely made when the Law sets no time for making the objections and the creditor having the right to make said objections at any time.

Reasons for Granting this Writ

Petitioners believe this writ should be granted for the following reasons:

No evidentiary hearing was ever held in proof of which we have made a part or our appendix a complete transcript of all hearings held before the District Court plus the Certificate of the Court's official Reporter, herein attached and identified as Exh. I.

The Trustee in Bankruptcy has the burden of proof to void a mortgage as an unlawful preference and thus must affirmatively allege and prove:

1. The insolvency of the bankrupt at the time the preference was given.
2. The giving of a preference within four months prior to the filing of the Petition in Bankruptcy.
3. The necessity that the creditors receiving the preference obtained a larger percentage of their debt than any other creditor of the same class.
4. The diminution or depletion of the estate of the debtor resulting from alleged preference.
5. The belief of the persons at the time of receiving the preference that the enforcement of the transfer or lien would effect a preference.

Numerous cases, both in District Courts and in other Circuits have decided that each and every one of the above prerequisites must be affirmatively proven by the Trustee, before he can recover property transfered within the four months period. To cite just a few, see: *In re Carlile,* (DC NC) 199 Fed. 612; *Mayes* v. *Palmer,* (CCA 8) 208 Fed. 97; *In re Venie,* (DC MO) 80 F. Supp. 247; *Cate* v. *Certainteed Products Corp.,* 23 Cal. (2nd Series) 44, 144 Pac. 2nd 335; *Putnam* v. *U.S. Trust Co.,* 223 Mass. 199, 111 NE 969; *Delong* v. *Denton,* 141 Misc. 1, 252 NYS 168. *Nunnemaker Transp. Co.* v. *United Cal. Bank,* (1972 CA 9 Cal.) 456 Fed. 2nd 28, *In re Sam X Lorch,* 199 Fed. Rep. 944.

The Circuit Court of Appeals, based entirely on inferences and presumptions decided that some of the prerequisites had been proven, but neither the District Court nor the Circuit Court even consider that the Trustee did not prove, the depletion of the estate resulting from the alleged preference, nor the insolvency at the time of the transfer, and appellants were given no opportunity what-

soever to disprove the inferences and presumptions used by the lower courts.

The complete absence of any evidentiary hearings, the fact that appellants were not given any opportunity to disprove the alleged evidence presented by the Trustee operates to deprive Petitioners of the rights garanteed by the Fifth Amendment to the Constitution of the United States.

> "A fundamental requisite of the due process guaranteed by this amendment is the opportunity to be heard." *Fravel Products Corporation* v. *McManigal*, (DC NY) 14 F. Supp. 414.

Furthermore, Sec. 60 of the Bankruptcy Law, Title 11, Sec. 96, Sub-Section II, Par. 8(b) established the necessity of a plenary proceedings before a preference may be avoided. The complete absence of a hearing departs from the usual course of judicial proceedings to such an extent that it operates as a violation of the Fifth Amendment.

> "Due process of law inhibits the taking of one man's property and giving it to another contrary to settled usages and modes of procedure, and without notice or opportunity for a hearing." *Ochoa* v. *Hernandez y Morales*, 230 U.S. 139, 57 L.Ed. 1427.

Just to stress the paramount importance of holding an evidentiary hearing we submit that the Trustee must prove that the debtor was insolvent at the time of the transfer. The mere filing of a Petition in Bankruptcy does not prove, nor it can be accepted as proof of insolvency as the Circuit Court decided, simply because the filing of a Petition in Bankruptcy merely means that the "insolvency"

for the determination of an illegal preference is determined under Sub-Section 19, Sec. 1, Title 11, which states that a person is insolvent when his assets, *in fair valuation,* are insufficient to meet his debts. (*In re Pingel,* 283 Fed. 664; *In re Klein Moffett Co.,* 28 Fed. 2nd 523). Thus, it is quite apparent, that the mere filing of the petition in Bankruptcy is not, and cannot be used as evidence of insolvency. Again, we repeat, we were given no opportunity whatsoever to present any proof in deprivation of the constitutional rights of Petitioners, with a complete absence of due process and at variance with the established modes of procedure.

Rule 301 of the Federal Rules of Evidence establishes the weight and extent of presumptions. It is apparent that the lower courts used presumptions in the instant case to sustain the Trustees position but they ignored that the Trustee had the burden of proving his case. If he had filed an action, the rule would have been sufficient, perhaps, to get the Trustee past a motion to dismiss and it would have forced us to offer evidence contradicting the presumed fact. (CONF. RPT. No. 93 1597 to accompany HR 5463 SP.L. 93-595). But the lower Courts used presumptions, in violation of Rule 301, to establish facts without giving opportunity to Petitioners to disprove such presumptions.

Section 96 of Title 11, Sub-Section 8(b) cited *supra,* by its own wording clearly established that the Trustee must file plenary proceedings and prove all the elements of an illegal transfer where it avers:

> "For the purpose of any recovery or avoidance under this section, where plenary proceedings are necessary . . . ."

Conclusion

For The Foregoing Reasons this petition for a writ of Certiorari should be granted.

Respectfully submitted,

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Mayaguez, Puerto Rico 00708

Appendix "A" 1

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

Bankruptcy No. B-46-70
B-47-70
B-48-70
B-49-70

In the Matter Of:

AMECO CORPORATION
AMECO ENTERPRISES, INC.
AMECO HOMES, INC.
ROMAVEL, INC.

DEBTORS

v.

MARIANO A. ROMAGUERA
JOSE RAMON VENDRELL, JR.
CESANI HARDWARE, INC.
MAYAGUEZ READY MIX, INC.

APPELLANTS

ORDER

The Court has before it three motions which are germane among themselves; namely

(a) A motion dated October 14, 1971 by the Trustee requesting that this Court rule as to whether the credit in favor of Messrs. Mariano Romaguera and Ramon Vendrell against Roma Vel, Inc. is a secured or unsecured credit;

(b) A motion by Mr. Enrique Alcaraz Casablanca, dated December 11, 1972, as attorney for Cesani Hardware, Inc., Mayaguez Ready Mix, Inc., Mariano Antonio Romaguera and Jose Ramon Vendrell, Jr., requesting that the credit of Messrs. Romaguera and Vendrell be considered a secured credit entitled to priority in payment; and

(c) A motion requesting ruling by Mr. Enrique Alcaraz Casablanca on behalf of Messrs. Romaguera and Vendrell, (dated April 19, 1973), requesting that plenary proceedings be held to determine whether a credit of said gentlemen against Roma Vel, Inc. is an illegal preference or not.

All parties have filed memoranda dealing with their respective points of view and a hearing was held and the parties met in chambers a number of times with the Court.

Being duly advised by all the parties, the Court determines the following:

1. *Motion requesting ruling dated (October 29, 1973) and filed by Mr. Enrique A. Alcaraz Casablanca.*

The Petitioners, Messrs. Romaguera and Vendrell, have been a party to the proceedings in the above captioned cases from the very beginning. As a matter of fact they filed a motion on December 11, 1972 in opposition to the Trustee's request that their credit be deemed unsecured. They also filed proofs of claim dated November 19, 1971. A hearing was held subsequently and written memoranda were filed on their behalf. Petitioners Robaguera and Vendrell, through their attorney, accepted as a fact that they presented their mortgage for recordation on July 30, 1970 although said mortgage had been signed on April 18, 1968, that is, two years prior to filing for recordation. No reasonable excuse has been given to the Court for this delay. The reorganization proceedings in the above captioned cases were filed on August 7, 1970. Petitioners Romaguera and Vendrell, throughout this period of time consented to the jurisdiction of this Court by requesting a hearing, being present and actively participating in the hearing and filing written memoranda; it is only on October 29, 1973 that the Petitioners request a plenary proceeding

against the summary proceeding which was already being held. Section 23 of the Bankruptcy Act, 11 U.S.C.A. 46, gives jurisdiction to the United States District Courts over all controversies at law and in equity relating both to controversies arising in the bankruptcy proceedings as well as over the bankruptcy proceedings proper. Petitioners cannot, after consenting to the jurisdiction of this Court for a summary proceeding, change their minds in order to defeat the jurisdiction of this Court.

THEREFORE, the Motion requesting ruling filed by Atty. Enrique A. Alcaraz Casablanca on behalf of Romaguera and Vendrell, Jr., dated October 29, 1973 is hereby DENIED.

2. *Motion requesting hearing filed by Mr. Enrique A. Alcaraz Casablanca on behalf of Cesani Hardware, Inc., Mayaguez Ready Mix, Inc., Mariano Romaguera and Jose Ramon Vendrell, dated December 11, 1972.*

In the brief of counsel filed in support of this motion, petitioners' attorney accepts that the mortgage was presented for recordation within the 120 day period immediately prior to the commencement of the bankruptcy proceedings in the above captioned cases. No reason whatsoever is given for the tardiness of Petitioners in presenting their mortgage to the Registry of Property. Furthermore, Petitioners accept that they presented for recordation the mortgage only seven days prior to the commencement of the bankruptcy proceedings although said mortgage had been signed and executed more than two years prior to that date. Under Section 60(a) of the Bankruptcy Act, 11 USCA 96, a preference is a transfer of any property of a debtor for the benefit of a creditor, made or suffered by such debtor while insolvent and within four months before the filing of a petition initiating a proceeding under the Bank-

ruptcy Act and when the effect of said transfer would be to enable the creditor to obtain a greater percentage of said debt with some other creditor of the same class. Petitioners Romaguera and Vendrell were by their own admission unsecured creditors of Roma Vel, Inc., as of July 31, 1970; that is, seven days prior to filing of the bankruptcy proceedings in the above captioned cases. If this Court were to allow a priority to said Petitioners they would become secured creditors and would receive the full amount of their credits and thus a greater percentage of their debt than any other unsecured creditor, the class to which Petitioners belong.

Petitioners also request that the payment of interest to Trust Mortgage Corporation be deemed erroneous and that part of said interest be considered as an unsecured claim. Petitioners did not raise any such objection prior to the sale of the Belmonte projects, although they were notified of the whole transaction and the hearing was held prior to the Court authorizing the sale of said projects. As a matter of fact, Petitioners' attorney represented two other parties in the Belmonte sale. One of the other parties, Mr. Waldema Bravo, received interest in the same manner as Trust Mortgage Corporation. Petitioners are not attacking the payment of said interest to Mr. Bravo and yet they do object to the payment made to Trust Mortgage Corporation. The Court having held a hearing on the sale of the Belmonte projects and no timely objections having been raised at the time, does not consider the present objection filed by Petitioners to be correct. For the above reasons, the requests made in the Motion dated December 11, 1972 by Atty. Enrique A. Alcaraz Casablanca on behalf of Cesani Hardware, Inc., Mayaguez Ready Mix, Inc., Mariano Romaguera and Jose Ramon Vendrell, Jr., are hereby DENIED.

3. *Motion of the Trustee dated October 14, 1971.*

For the reasons discussed above in this matter the Court understands that the credits held by Messrs. Romaguera and Vendrell, Jr. against Roma Vel, Inc. were not presented for recordation prior to the 120 days period immediately preceding the commencement of the proceedings in the above captioned cases and that as such Messrs. Romaguera and Vendrell were unsecured creditors of Roma Vel, Inc. as of the date of the commencement of the reorganization proceedings. Section 60(a)(2) of the Bankruptcy Act, 11 U.S.C.A. 96,

THEREFORE, the credit belonging to Messrs. Romaguera and Vendrell is a general unsecured credit and is not entitled to any priority in these proceedings.

IT IS SO ORDERED.

San Juan, Puerto Rico, this 21st day of January 1974.

(Signed) HIRAM R. CANCIO

HIRAM R. CANCIO

Chief Judge

Appendix "A" 2

NOT FOR PUBLICATION

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

No. 74-1266

In the Matter Of:

AMECO CORPORATION
AMECO ENTERPRISES, INC.
AMECO HOMES, INC.
ROMAVEL, INC.
APPELLEES,

v.

MARIANO A. ROMAGUERA
JOSE RAMON VENDRELL, JR.
CESANI HARDWARE, INC.
MAYAGUEZ READY MIX, INC.
APPELLANTS.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

Before COFFIN, *Chief Judge*,
ALDRICH and MCENTEE, *Circuit Judges*.

E. Alcaraz Casablanca on brief for appellant.
Roberto Buso Aboy for Trustee, appellee.

March 12, 1975

PER CURIAM. Appellants Romaguera and Vendrell challenge the district court's determination that, notwithstanding the fact that at the time the bankruptcy petition was filed they held mortgage notes in the original amount of $265,000, their claim is unsecured. Although the mortgage

had been executed in 1968, it was not presented for registration until July 31, 1970, shortly before the petition was filed on August 6, 1970. Under Puerto Rican law, a mortgage must be entered in the registry of property in order to be "validly constituted". 31 L.P.R.A. § 5042. Appellants concede that this belated presentation of the mortgage constituted a transfer within four months of the filing of the petition, but urge that the district court erred in viewing it as a voidable preference.

> "A preference is a transfer . . . of any of the property of a debtor to or for the benefit of a creditor for or on account of an antecedent debt, made or suffered by such debtor while insolvent and within four months before the filing by or against him of the petition initiating a proceeding under this title, the effect of which transfer will be to enable such creditor to obtain a greater percentage of his debt than some other creditor of the same class." 11 U.S.C. § 96(a)(1).
>
> "Any such preference may be avoided by the trustee if the creditor receiving it or to be benefited thereby or his agent acting within reference thereto has, at the time when the transfer is made, reasonable cause to believe that the debtor is insolvent . . . ." 11 U.S.C. § 96(b).

Although appellants stress that the burden is on the Trustee to establish each of the elements of a voidable preference, our study of the record has convinced us that only the "insolvency" and "reasonable cause to believe" issues are substantial enough to merit discussion.[1] As to insolvency, appellants' major argument is the suggestion that the court's unchallenged finding of insolvency as of

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[1] Appellants themselves seemed to recognize this when they pressed only these contentions in their reply to the Trustee's district court brief.

August 6 did not conclusively establish insolvency as of July 31. It is true that July 31 is the relevant date as far as the mortgage is concerned, but there can be no doubt that, in the absence of evidence to the contrary, insolvency at the time of filing adequately supports the inference that the debtor corporations were insolvent one week earlier.[2]

There was also adequate support for the conclusion that at the time of the transfer appellants had reasonable cause to believe that the debtors were insolvent. The close proximity in time of the presentation of the mortgage and the filing of the petition, to which the district judge made specific reference twice in his order, would be probative standing alone, and the court had before it, in addition, appellants' admission that on July 31, 1970 the party holding a mortgage senior to that of appellants began foreclosure proceedings. Moreover, appellants have not disputed the Trustee's representation, contained in his brief, that the proofs of claims filed by appellants show that the debtors were in arrears as to both principal and interest owed to appellants.

Appellants contest the court's exercise of summary jurisdiction. This argument must fail, both because the property in dispute was in the possession of the bankruptcy court, 2 Collier on Bankruptcy ¶ 23.04[2], at 453 (1975), and because appellants had consented through their par-

---

[2] Appellants would have us read the bankruptcy petition, which states that the debtor corporations "are unable to pay their debts as they mature", as demonstrating that the corporations were not insolvent but merely illiquid. First, the bankrupt's own statements are certainly not controlling. Moreover, even the petition in this case, while expressing the belief that in "normal times" assets would cover liabilities, acknowledges that assets were insufficient under the conditions then prevailing. The petition thus in no way undermines the district court's conclusion that the debtor was insolvent within the meaning of 11 U.S.C. § 1(19).

ticipation in the proceedings, which included the filing of a claim. *Id.* ¶ 23.07[1], at 520-21.

Appellants Cesani Hardware, Inc. and Mayaguez Ready Mix, Inc. contend only that they should have received a hearing on their objection to the Trustee's payment of interest to Trust Mortgage Corporation. The objection, dated December 11, 1972, was not timely made, a hearing having been held November 10, 1972 on the sale of the property and the satisfaction of the first mortgage.

The District Court's order is affirmed in all respects.

Appendix "A" 3

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 74-1266.

In Re
AMECO CORPORATION ET AL.,
v.
MARIANO A. ROMAGUERA ET AL.,
APPELLANTS.

JUDGMENT
Entered March 12, 1975

This cause came on to be heard on appeal from the United States District Court for the District of Puerto Rico, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The order of the District Court is affirmed in all respects.

By the Court:
(s) DANA H. GALLUP, *Clerk.*

[cc: Messrs. Alcaras Casablanca and Buso Aboy.]

Appendix "A" 4

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 74-1266

In the Matter of

AMECO CORPORATION
AMECO ENTERPRISES, INC.
AMECO HOMES, INC.
ROMAVEL, INC.
APPELLEES,

v.

MARIANO A. ROMAGUERA
JOSE RAMON VENDRELL, JR.
CESANI HARDWARE, INC.
MAYAGUEZ READY MIX, INC.
APPELLANTS

PETITION FOR REHEARING

Before COFFIN, *Chief Judge*,
ALDRICH and MCENTEE, *Circuit Judges*.

MEMORANDUM AND ORDER
Entered April 14, 1975

This petition for rehearing argues that the transfer in question could not be a voidable preference because it was not "for or on account of an antecedent debt", petitioners having given value when they received the mortgage. Petitioners overlook, however, the fact that while they gave value in 1968, the "transfer" did not take place until 1970 when their mortgage was presented for registration and "became so far perfected that no subsequent bona fide purchase from the debtor could create rights in such prop-

erty superior to the rights of the transferee." 11 U.S.C. § 96(a)(2). The transfer was therefore for or on account of an antecedent debt.

Petition denied.

By the Court,

(s) DANA H. GALLUP, *Clerk.*

[cc. Messrs. Casablanca and Buso Aboy.]

EXHIBIT I

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

Bankruptcy No. B-46-70
B-47-70
B-48-70
B-49-70

In the Matter Of:

AMECO CORPORATION
AMECO ENTERPRISES, INC.
AMECO HOMES, INC.
ROMAVEL, INC.

DEBTORS

v.

MARIANO A. ROMAGUERA
JOSE RAMON VENDRELL, JR.
CESANI HARDWARE, INC.
MAYAGUEZ READY MIX, INC.

APPELLANTS

REPLY TO REQUEST FOR TRANSCRIPT OF PROCEEDINGS

To Enrique Alcaraz Casablanca, Esquire
Attorney for Appellants

Now appears the undersigned Court Reporter, pursuant to the request for transcript of proceedings in the above

entitled actions, and states that in compliance therewith the following action was taken:

(1) Docket entries in the office of the Clerk of the Court were checked and dates noted whenever a hearing was indicated or scheduled, from January 1971 through January 1974.

(2) Notebooks of the Court Reporter were reviewed for the dates mentioned in (1) above.

(3) Transcript of hearings held on October 18, 1971, November 10, 1972, and February 21, 1973, are attached for whatever information counsel may deem pertinent.

As a result of the search indicated in paragraphs (1) and (2), the following information is provided:

May 26, 1971	Petition hearing set for June 7-8. (No entry was found in the Reporter's notebook, indicating no proceedings held on that date.)
June 15, 1971	Hearing on Petition under Chapter X. (Mr. Alcaraz Casablanca appeared. Stated he knew nothing about motion to deliver certain properties. Court to rule on petition.)
July 30, 1971	Hearing on objections to Mr. Abraham Gonzalez as Trustee.
Oct. 18, 1971	Hearing on pending matters. (Transcript of this hearing is attached. Mr. Alcaraz Casablanca did not appear.)
Mar. 17, 1972	Motion for costs of administration. (No entry was found in the Reporter's notebook.)

Mar. 24, 1972	Motion for costs of administration. (No entry was found in the Reporter's notebook.)
Mar. 29, 1972	Motion for administrative expenses.
Sept. 20, 1972	Hearing on objections filed by Trust Mortgage Company. Mr. Bernardo Perez Daple, account, testified.
Nov. 3, 1972	Motion of Trustee for compliance with contract bonds. (No entry was found in the Reporter's notebook.)
Nov. 10, 1972	Motion of Trustee for approval of sale. (Mr. Alcaraz Casablanca appeared. Transcript of hearing attached.)
Nov. 21, 1972	Motion of Trustee requesting compliance with contract bonds.
Dec. 20, 1972	Motion requesting compliance with contract bonds. Motion relative to interest paid on properties of Romavel. (No entry was found in the Reporter's notebook.)
Dec. 21, 1972	Trustee's motion requesting authorization for payment of costs of administration.
Feb. 20, 1973	Motion of Trustee requesting compliance with contract bonds.
Feb. 21, 1973	Further hearing on Motion of Trustee requesting compliance with contract bonds. Two witnesses testified. Excerpt of proceedings attached. (Mr. Alcaraz Casablanca appeared.)
Feb. 22, 1973	Motion involving Mr. Alcaraz Casablanca's clients was continued to this date, but no entry appears.

May 4, 1973	Motion requesting the Court to restrain injunction proceedings. (No entry was found in the Reporter's notebook.)
Jan. 4, 1974	Motion of Trustee listing claims pending payment.
Jan. 25, 1974	Motion requesting dismissal. Judge Cancio disqualified himself.

In the proceedings listed above, no appearance was made by Mr. Alcaraz Casablanca unless specifically stated.

I CERTIFY that a careful search of my notes for the period indicated reveals no participation by appellants or their counsel beyond that stated above.

(s) MAXINE M. MADDEN
MAXINE M. MADDEN
Official Reporter
United States District Court
for Puerto Rico

San Juan, Puerto Rico
16 April 1974

EXHIBIT II

MOTION REQUESTING RULING

Honorable Court:

Now appear Mariano A. Romaguera and Jose Ramon Vendrell Jr., by counsel and respectfully request this Honorable Court to rule that:

For trustee to set aside a claim as an illegal preference he must file a complaint; that the appearing parties, as defendants in said action have the right to plenary proceedings and that the Trustee may not be heard by this Court of the question of preference without the consent of

the appearing parties and that no illegal preference exists until the Court has so declared in plenary proceedings in which the appearing parties are made party defendants.

Respectfully submitted this 29th day of October 1973.

(s) E. ALCARAZ CASABLANCA
E. ALCARAZ CASABLANCA
Attorney for defendants.

EXHIBIT III

MOTION REQUESTING HEARING

NOW APPEAR CESANI HARDWARE, INC., MAYAGUEZ READY MIX INC., MARIANO ROMAGUERA and JOSE RAMON VENDRELL, JR., by counsel, and respectfully state and request:

That according to information and belief the Trustee has paid to Trust Mortgage Corporation all interest due on a mortgage or mortgages encumbering the properties of Romavel, Inc. and other corporations, when said interest was not subject to any priority in payment, as according to the mortgages themselves only a set amount was guaranteed by mortgage and the balance is and should be considered as an unsecured claim.

That the trustee has been considering all the corporations under bankruptcy as one sole entity.

That several persons, among them, Mariano Antonio Romaguera, Jose Ramon Vendrell, Jr., a person named Castro and Mr. Fidel Pino, hold contracts with Romavel Corporation whereby they are given a percentage of the profits, if any, thus creating a joint venture with Romavel, Inc.

That said corporations should be considered as separate and distinct entities and their liabilities paid separately to determine whether there is any profit that may accrue to

the persons above named, after all debts of Romavel, Inc. have been paid.

That Mariano Antonio Romaguera and Jose Ramon Vendrell, Jr., were the holders of a junior lien, and according to the trustee they are not entitled to priority payment because—their lien is considered an illegal preference.

That the lien held by the aforementioned persons cannot be considered an illegal preference under the Bankruptcy law because the transaction that originated the lien was not a borrowing transaction but was the case of an exchange of one species of property for another which did not result in any depletion of the state of the bankrupt.

WHEREFORE, the appearing parties respectfully request the Court to set date to hear the parties on the above allegations and after hearing the evidence rule that part of the interest paid to Trust Mortgage Corporation must be returned as it was not guaranteed by mortgage and thus it is an unsecured claim; That Romavel, Inc., must be considered separate and distinct entity; that the lien held by Messrs. Romaguera and Vendrell does not constitute an illegal preference under the Bankruptcy Act.

At Mayaguez, Puerto Rico for San Juan, Puerto Rico, this 11 day of December, 1972.

(s) E. Alcaraz Casablanca
E. Alcaraz Casablanca
Attorney for the appearing parties.

Appendix "A" 5

STENOGRAPHIC TRANSCRIPT OF TESTIMONY

[1] IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

Bankruptcy No. B-46-70
B-47-70
B-48-70
B-49-70

In the Matter Of:
AMECO CORPORATION
AMECO ENTERPRISES, INC.
AMECO HOMES, INC.
ROMAVEL, INC.

HEARING ON APPROVAL OF PLAN

BE IT REMEMBERED that a hearing was held in the above entitled action before the HONORABLE HIRAM R. CANCIO, Chief Judge, United States District Court for the District of Puerto Rico, sitting at San Juan, Puerto Rico, at 9:30 in the morning on 18 October 1971.

APPEARANCES:

Jose Otero Suro, Esquire
Roberto Buso Aboy, Esquire
Luis Blanco Lugo, Esquire
Abrahan Diaz Gonzalez, Esquire
Ruben O. Figueroa, Esquire
Andres Guillemard, Esquire
Rafael Baragano, Esquire
Benicio Sanchez Rivera, Esquire
Jorge Gonzalez Vizcarrondo, Esquire

(short discussion was held off the record.)

[2] The Court: The Court had an off the record conversation with the parties, and all have agreed that the pending matters are (1) the approval or non-approval of the plan, considering the plan itself and the objections raised to the plan of the Trustee by several parties; and (2) the rendering of accounts by the Receiver to which there are some objections on the part of some of the parties regarding the fees due the Receiver himself and to his attorney, Mr. Buso; and (3) the problems regarding the list of creditors and possible objections by any of the parties.

There was another point raised which actually isn't pending, but is a new point raised by Mr. Jose Otero Suro. Before hearing Mr. Otero Suro, I recognize Mr. Guillemard.

Mr. Guillemard: May it please the Court, I think there is another motion submitted by the Trustee that even receiving a copy regarding the determination by the Court, whether or not a certain debtor is secured or unsecured.

The Court: Whether or not who is secured or unsecured?

Mr. Buso: A Debt to Mr. Romaguera or Mr. Vendrell, whether it is secured or unsecured. It is basically a matter of law and Your Honor can determine whether it is a secured or unsecured debt. It can be submitted even without the memorandum.

The Court: It is pending?

Mr. Buso: Yes, Your Honor, but it was filed last week and it was just submitted on the motion. It hasn't been set [3] for hearing yet. We don't think there is any hearing necessary for that motion. We can submit a memorandum or just submit it on the motion.

The Court: I prefer to have a short memorandum. How many days do you need?

Mr. Buso: We can have it within a week.

The Court: How about you, Mr. Guillemard?

Mr. Guillemard: No objection to one week, Your Honor.

If anybody is going to submit a motion, it should be Mr. Alcaraz Casablanca.

Mr. Buso: He has knowledge of the motion.

The Court: He objects?

Mr. Buso: Not officially. He gave us the information upon which we based the motion.

The Court: I haven't seen this motion.

Mr. Buso: It is a matter of law, Your Honor.

Mr. Sanchez Rivera: This is a question raised by the Trustee himself.

The Court: Who are in the controversy here?

Mr. Guillemard: I would say none are parties. The only one in controversy might be Mr. Enrique Alcaraz Casablanca whose client might become an unsecured creditor from a secured creditor.

The Court: I would hate to decide this without getting Mr. Alcaraz Casablanca's memorandum.

[4] Mr. Diaz Gonzalez: I must convey that this motion was prepared after a conversation with Mr. Enrique Alcaraz Casablanca. The filing was delayed two days, waiting for a letter he was going to send us and which I am certain is in the mail, that will dispose of the whole matter, because it is merely a question of law. Therefore, I beg Your Honor to wait a couple of days, because I think the matter will take care of itself. Mr. Alcaraz Casablanca will forward the letter and we may file the letter as an exhibit to the motion, and there will be no problem. The rest of the parties are not opposed, or affected.

The Court: And Mr. Alcaraz Casablanca's letter would be to the effect that he does not oppose it?

Mr. Diaz Gonzalez: To the effect that the registration was not carried out without the term of 120 days. That is, that it was filed in the Registry of Property within 120 days before the filing of the petition, which of course disposes of the matter.

The Court: I will do this. Instead of giving you seven days to file a memorandum, I will give you this seven day period to file an informative motion to the Court, saying this is what has happened in the case of Mr. Enrique Alcaraz Casablanca, and, and accompany it with the letter, or if Mr. Alcaraz Casablanca didn't send the letter—I will not take care of this matter until I hear from you. Any objection? Off the record. (Thereupon a short discussion was held off [5] the record.)

The Court: Please explain the summary of the conversation that was had off the record.

Mr. Diaz Gonzalez: Well, Your Honor, immediately after the order appointing the Receiver was rendered, the Receiver prepared a letter of all claims pending in the matter of cases B-46-70 to B-49-70. A letter was prepared and forwarded to each and every one of the creditors, and there was a draft enclosed for their answer in which the only thing they had to do was to fill in the amount, and to convey to the Receiver whether they agreed or disagreed.

The Court: I take it they had to sign it, too?

Mr. Diaz Gonzalez: We received immediately thereafter about 50 percent of the letters we sent, which represented about 90 percent of the credits against the combined corporations. Thereafter—

The Court: I did not understand, excuse me. Between 50 percent and 90 percent?

Mr. Diaz Gonzalez: We received 50 percent of the number of letters we sent, replying; but the 50 percent who replied represented 90 percent of the amount credited against the corporations. Thereafter, we sent a second letter, and most of those who hadn't answered, replied. Therefore, there may be a very small group of people who haven't answered, but it is negligible, and I would suggest, Your Honor—

[6] The Court: In that negligible group, is there anyone who does not have a negligible amount?

Mr. Diaz Gonzalez: Not that I know of, Your Honor. I believe that the main problem we have is that most of these people who wrote back and that are included among the creditors are under the impression that they have fulfilled all the requirements established to set off their claims, and I would say that about 100 of these people have come to the office and had meetings with me and Mr. Perez Daple and occasionally with Mr. Buso. Mr. Perez Daple is consultant to the Receiver and Mr. Buso is counsel to the Receiver. Therefore, I respectfully suggest and respectfully submit that the Court accept as a proof of claim the credits which have been conveyed to the Trustee, which have been examined by the Trustee, which have been verified by the Trustee, and which have been listed in the plan, and that a term of 15 days be given to anyone who wants to raise an objection, or to anyone who feels he has a claim and has not filed it.

The Court: According to this, anybody who has not written once or to the court, who has a proof of claim, may come within 15 days after the Order, and anybody who feels that the amount recognized in the Plan is higher than it is in the Plan, may come within those 15 days with his claim, or additional claim?

Mr. Baragano: Or that he is listed as unsecured, and should be secured.

[7] The Court: Anybody that would feel that he is adversely affected by the plan may come within fifteen days.

Mr. Diaz Gonzalez: I would agree with you, and I think the only thing remaining pending would be (1) some exclusion, someone who has been excluded; (2) someone who feels the amount differs. Someone that feels he is secured, and has been classified otherwise.

The Court: Anybody that feels, in summary, that he is adversely affected may come within fifteen days.

Mr. Otero Suro: Then I move, Your Honor, that the Order state that after these fifteen days have elapsed, all the claims that are according to the statement of the Trustee, be allowed because otherwise he wouldn't have any claims allowed, we would have a mere statement by the Trustee.

The Court: Everybody in agreement with that?

Mr. Blanco Lugo: Yes, sir.

The Court: Is that what you were going to say, Mr. Buso?

Mr. Buso: The same as Mr. Otero Suro.

Mr. Guillemard: Am I to understand that Banco Credito y Ahorro need submit no proof of claim, because its been received by the Trustee.

The Court: Yes. Any objection that I ask the Trustee to prepare a form of order in the manner we have discussed here?

Mr. Blanco Lugo: I would like, as an amendment, to suggest that the Trustee file the acceptances with the Clerk of the Court—the acceptances of the creditors contained in [8] their reply letters to the letter he sent them about their credit, so we have a clear picture, and that these amounts were accepted and the status of the creditors were accepted too.

The Court: That was accepted by him off the record. So include that in the order.

Mr. Sanchez Rivera: I want to bring up what the Bankruptcy Law says about this, and I think we are anticipating what we are doing here. We can not do it until a plan is approved. Section 196 of the Law says, "After the approval of the petition the judge shall prescribe the manner in which and fix a time within which the proofs of claim of creditors and of the interests of stockholders may be filed and allowed."

And then, "Objections by any party in interest to the allowance of any such claims or interests shall be heard and summarily determined by the Court."

In other words, I am all for what my distinguished colleagues have proposed, but I think it has to be done after approval of the petition.

Mr. Buso: The petition, not the plan.

The Court: Off the record. (A short discussion was held off the record.)

The Court: Mr. Diaz Gonzalez and Mr. Buso, when do you think you will have this proposed Order ready?

Mr. Diaz Gonzalez: Today or tomorrow at the latest. It won't be very difficult.

[9] The Court: Let's say you have three days to file the proposed order. This order will cover the three points we mentioned at the beginning. After studying the order and reviewing it, the Court will adopt it or change it or decide whether or not to issue it. I don't believe there is any other matter pending before the Court.

CERTIFIED to be a true and correct transcript of the hearing held in the above entitled action on October 18, 1971.

(s) MAXINE M. MADDEN
MAXINE M. MADDEN
Official Reporter
United States District Court
for Puerto Rico

[1] IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

Bankruptcy No. B-46-70
B-47-70
B-48-70
B-49-70

In the Matter Of:
AMECO CORPORATION
AMECO ENTERPRISES, INC.
AMECO HOMES, INC.
ROMAVEL, INC.

HEARING ON MOTION OF TRUSTEE APPROVING SALE OF EL MONTE PROJECT

BE IT REMEMBERED that a hearing was held in the above entitled action before the HONORABLE HIRAM R. CANCIO, Chief Judge, United States District Court for the District of Puerto Rico, sitting at San Juan, Puerto Rico, at 2:00 in the afternoon on November 10, 1972.

APPEARANCES:

Robert Buso, Esquire
Luis Blanco Lugo, Esquire
Enrique Alcaraz Casablanca, Esquire
Mr. Guillermo R. Morini
Mr. Fidel Pino

Mr. Buso: May it please the Court. Mr. Fidel Pino is present also. He is the president of the corporation who desires to purchase the project, and Mr. Guillermo Morini, one of the general creditors of AMECO, is also present. Both are present in court.

[2] The Court: They are not represented by counsel?

Mr. Buso: No, Your Honor.

The Court: They both understand English, I understand?

Mr. Buso: Yes.

Mr. Pino: I have decided not to be represented by counsel.

Mr. Buso: There are two written motions before the Court, one requesting approval of the sale of El Monte Project in Mayaguez, pertaining to AMECO CORPORATION. Other details of the sale are described in the motion.

There is a supplementary motion also filed by the attorney for the Trustee, amending in part the originial motion which has been accepted by the parties. As of this moment there has been no written opposition, and we don't know anyone who wishes to oppose the motion here.

The Court: Before I ask that question, let me state for the record that this morning the hearing scheduled for 9:30 had to be continued to this afternoon at 2:00, due to the fact there was some problem with the electrical system in the whole building, and that I personally came and talked to all the attorneys who were present waiting for that hearing, and the parties who were present, and I told all of them the hearing was continued for this afternoon, which means that all who came this morning were notified of this afternoon's hearing. Is there any person present in the court room, attorney or party, who has any objection? There is no answer so I take it that the answer is no, on the part of those who may be attorneys [3] or parties in this case. Mr. Blanco Lugo, do you wish to address the Court?

Mr. Blanco Lugo: Yes, Your Honor. May it please the Court, we pray that on approval of the sale of the project —

The Court: You refer to the original motion?

Mr. Blanco Lugo: Yes, Your Honor.

The Court: And, of course it is clear from the appearance of the Trustee and Mr. Bravo that this original motion is amended in the manner described in the second motion of November 3, the same date.

Mr. Blanco Lugo: Yes, Your Honor. What I was going to inform the Court is that under paragraph 2, we asked the Court that in the case this motion —

The Court: Off the record. (A short discussion was then held off the record.)

Mr. Blanco Lugo: We pray the Court that all mortgage liens of whatever nature that affect the properties will be cancelled, and the Court will issue the necessary cancellation to the Registrar of Property in Mayaguez. I would ask the Court to grant permission, to grant a supplementary motion making special reference to the liens that are going to be cancelled if the Court approves the sale of the project, so it would be clear to the Clerk of the Court when the writ of cancellation is issued.

The Court: I think this is a matter that can be done [4] without having to notify all these people. This is more than anything for orientation of the Court and Registrar of Property.

Mr. Blanco Lugo: Yes, Your Honor.

The Court: When would you file that?

Mr. Blanco Lugo: Not later than Tuesday morning.

The Court: You are allowed to file that during the course of next Tuesday, November 14.

Mr. Blanco Lugo: Thank you, Your Honor.

Mr. Buso: We are in complete agreement with Mr. Blanco Lugo in his petition, and understand it is mainly clarification of certain points, and there is no need for further hearing. We are willing to rest our motion on written statements without having to take more time of the Court for further argument. If Your Honor desires further oral argument, we will be willing to do so.

The Court: I don't think it will be necessary. What I have studied from this motion and the rest of the record is that I am very familiar with the fact that there is no opposition from anyone as everyone interested has been notified. I think I am in a position to approve this.

So the motion requesting approval of the sale of the El Monte Project is hereby approved, subject to the clarifications to be made as Mr. Blanco Lugo expressed to the Court. And of course subject also to the change of the motion of Mr. [5] Alcaraz Casablanca, signed also by Mr. Buso, regarding the fact that the lien was not a junior lien.

Mr. Blanco Lugo: May it please Your Honor, I would like to advise the Court there will be some controversy as to the preference or priority of some lien of one of his clients, but this can be decided later by the Court upon proper presentation of the facts, because the remainder of the moneys as purchase price will be deposited in the court.

Mr. Alcaraz Casablanca: The correct time for arguing the distribution of the money is at the time of the distribution. At that time we will raise the point of whether those liens are senior or junior liens or just preferences.

Mr. Buso: To make it very clear what we are talking about, the liens referred to by Mr. Blanco Lugo and Mr. Alcaraz Casablanca are those of Messrs. Romaguero and Vendrell. A motion filed by the Trustee almost a year ago, in which we are asking the Court to decide that these liens were not prior liens but preferences under the Bankruptcy Act, so they are not granted as secured liens.

The proper time, as Mr. Alcaraz Casablanca said, to decide whether they are secured liens or just preferences is at a further hearing which will have to be heard later anyway.

The Court: The Court agrees with you and Mr. Alcaraz Casablanca. I think you should prepare a form of order approving this particular sale, and mentioning the fact that [6] the motion was amended.

Mr. Alcaraz Casablanca: The motion does not say anything about paying anybody. The people I represent agreed not to collect the interest, that's all.

The Court: When can you have that order? Off the record. (A short discussion was held off the record.)

The Court: Is there anything further?

Mr. Blanco Lugo: No, Your Honor.

The Court: You may withdraw.

CERTIFIED to be a true and correct transcript of the hearing held in the above entitled action on November 10, 1972.

(s) MAXINE M. MADDEN
MAXINE M. MADDEN
Official Reporter
United States District Court
for Puerto Rico

[1] IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

Bankruptcy No. B-46-70
B-47-70
B-48-70
B-49-70

In the Matter Of:
AMECO CORPORATION
AMECO ENTERPRISES, INC.
AMECO HOMES, INC.
ROMAVEL, INC.

EXCERPT OF HEARING HELD ON FEBRUARY 21, 1973

APPEARANCES:
Roberto Buso Aboy, Esquire
Luis Blanco Lugo, Esquire
Abrahan Diaz Gonzalez, Esquire
Jose Otero Suro, Esquire
Aldo Segurola, Esquire
Orlin P. Goble, Esquire
Juan R. Zalduondo, Esquire
Enrique Alcaraz Casablanca, Esquire
Eduardo Baragano, Esquire

(Testimony was adduced regarding National Insurance Company and the Belmonte I and Belmonte II projects. Direct and cross examination was had of Luis Blanco Lugo, Esquire, and of Abrahan Diaz Gonzalez, Esquire.)

Thereafter, the following proceedings were had:

The Court: This hearing is continued to March 7, 1973. Let the record show that this matter we have been trying is continued to March 7, at 9:30. The matter which was continued [2] until tomorrow was the one involving At-

torney Alcaraz Casablanca and we have another matter with AMECO which is a matter with the Banco Popular. I don't think it is in the calendar.

Mr. Buso: May it please the Court. In April of last year a hearing was held by this Honorable Court regarding a petition by the Trustee to transfer the remaining assets of the Castellana Gardens Project to Banco Popular de Puerto Rico in consideration of the cancellation of some outstanding debts which were well over a million dollars. At that hearing, no opposition was heard. As a matter of fact, all the parties concerned were present, Great American Insurance, Banco Popular and ourselves, and some of the unsecured creditors, as a matter of fact, appeared. Brother Attorney Otero Suro was present that day also.

The Court accepted the transaction in principle, and requested me to prepare a form of Order, which we should circulate among all the different attorneys present that day, to make sure that the language would be amenable to everyone and there would be no future administrative problems with the court.

I proceeded to circulate a form of order, and received a written communication by Mr. Eduardo Baragano representing Banco Popular, requesting some amendments which were accepted by us. Nobody else answered in writing, but there were some reservations on the part of Great American Insurance Company at that point. They still wanted to think about the order.

[3] We have tried a number of times, personally and in writing, to get Great American Insurance to give us what, if any, are their real opposition to the order, and up to now it has been fruitless, so we actually asked the Court to set the hearing to determine if there was some need for further disposition of this matter or if the order could be signed forthwith.

This was scheduled for today. Brother Edward Baragano is representing Banco Popular. As usual, they are always well represented and I understand nobody else has appeared on this matter.

The Court: Will counsel please approach the bench?

(A short conference was held at the bench between the Court and counsel.)

Mr. Buso: For the record, we would request this Court to take action and approve the order that we have finally made with the different objections that brother Edward Baragano asked for, and we included. We can bring it in final form this afternoon, so you can read it and sign it.

The Court: There being no objection, and I have approved it in principle, I will sign it this afternoon or tomorrow morning. Of course, if I have any changes to make I will make the corresponding changes.

Mr. Buso: And when I ask Your Honor to sign it, it is if you approve it.

[4] The Court: Yes, but my signature will mean I approve it. Is there anything further with the AMECO case?

Mr. Buso: Nothing further.

CERTIFIED to be a true and correct transcript of the hearing held in the above entitled action on February 21, 1973.

(s) MAXINE M. MADDEN
MAXINE M. MADDEN
Official Reporter
United States District Court
for Puerto Rico

SUPREME COURT, U. S.

FILED

AUG 29 1975

MICHAEL RODAK, JR., CLERK

In The Supreme Court of The United States

OCTOBER TERM, 1975

No. 75-161

MARIANO A. ROMAGUERA, ET AL.,
Petitioners

v.

AMECO CORPORATION, ET AL.,
Respondents

ON APPEAL FROM AN ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

ROBERTO BURÓ ABOY
Counsel for the Trustee-Respondents
P.O. Box 11086
Santurce, P.R. 00910
Tel. 724-4114

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In The Supreme Court of The United States

OCTOBER TERM, 1975

No. 75-161

MARIANO A. ROMAGUERA, ET AL.,
Petitioners

v.

AMECO CORPORATION, ET AL.,
Respondents

ON APPEAL FROM AN ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Mr. Abrahán Díaz González, Trustee of the debtor corporations, respondents herein, prays that a writ of certiorari petitioned in the above captioned case be denied.

STATEMENT OF THE CASE

Respondents consider that the first three paragraphs of the Statement of the Case made by Petitioners are basically correct. Nevertheless, respondents disagree with the rest of the Statement of the Case made by Petitioners and do present the following aspects as the correct Statement of the Case in this matter.

Petitioners did present a position alleging that they were entitled to plenary proceedings, but only through a motion dated October 29, 1973 (see, Exhibit 2 of the Petitioners), which was over three years after the commencement of the bankruptcy proceedings, during which three years Petitioners had been active parties to said proceedings without at any time raising the possibility of their being entitled to plenary proceedings. Furthermore, at no time did Petitioners present any type of request or position to the District Court stating that a Trustee had the burden of affirmatively proving all the essential elements of an illegal preference at *one* hearing. On the contrary, the District Court was supplied throughout the proceedings in bankruptcy with all the evidence necessary to determine the legal point as to whether Petitioners were secured or unsecured creditors of Respondents. This evidence was accepted by all the parties involved including the Petitioners. In view of the above, the requirements for the presentation of evidence were met before the District Court, which was thus put in a position by all the parties wherein it could render a decision as to the nature of the credit held by Petitioners against Respondents. Petitioners accepted in writing that the date of the presentation of their mortgage at the Registry of Property of the Commonwealth of Puerto Rico was within the four months prior to the filing of the petition; in fact, it was six days before

the Filing. The Court was also informed that the mortgage had been executed more than two years prior to the presentation at the Registry of the Property. Therefore, as of the date of presentation for registration, the mortgage was guaranteeing an antecedent debt. Petitioners did not oppose the insolvency of the Respondents throughout the proceedings, although there were hearings in this regard at which Petitioners' attorney participated (see, Exhibit 1, Appendix "A"-4, of Petitioners' brief), and the Petitioners themselves in their Proofs of Claim filed in the bankruptcy proceedings claimed that Respondents were in arrears as to both principal and interest owed to Petitioners by said Respondents. The resulting depletion of the estate of Respondents need not be discussed in any great length since the payment to Petitioners of their claim in full as a secured claim would reduce the amount of money left to distribute among unsecured creditors and also would give Petitioners a larger percentage of their debt than any other creditor in the unsecured class. All these facts were not only uncontested but they were supplied to the District Court either directly by Respondents or with their acceptance, and provide the necessary elements of a preference under section 60(a) of the Bankruptcy Act. 11 U.S.C. § 96.

Regarding Petitioners Cesani Hardware, Inc. and Mayaguez Ready Mix, Inc., a hearing related to the payment of interest to Trust Mortgage Corporation was held on November 10, 1972 (see, Exhibit 1, Appendix "A"-4 of Petitioners' brief), at which hearing attorney for Petitioners was present and did not oppose the payment of the interest to Trust Mortgage Corporation which was part of the Sale Agreement authorized by the Court with the consent of the parties at the above mentioned hearing. As a result of the above fact, the objections presented by Cesani Hardware, Inc. and

Mayaguez Ready Mix, Inc. on December 11, 1972 were not timely made, a hearing having already been held on the matter of payment of interest to Trust Mortgage Corporation.

The District Court, with all the facts mentioned above, had enough evidence before it to determine the question of whether Petitioners' credit against Respondents was of a secured or an unsecured nature, and on January 21, 1974 the District Court rendered its decision on the matter. The United States Court of Appeals for the First Circuit affirmed the District Court's order in all respects and entered a judgement on March 12, 1975.

REASONS FOR DENYING THE WRIT OF CERTIORARI

1. The Petition and indeed the facts of the case do not present any reason under Rule 19 of the Rules of the Supreme Court of the United States to call for the exercise of this Honorable Court's power of supervision.

2. The constitutional requirement of a "hearing" was met during the proceedings before the District Court in the present case and enough evidence was presented to it in order to decide the question of whether Petitioners' credits were an unlawful preference under the Bankruptcy Act.

Rule 19 of the Supreme Court of the United States has not been met. First of all, there is no state court decision involved and therefore subparagraph (a) of Rule 19 is not applicable to this case. Secondly, Petitioners have neither alleged nor presented any proof wherein paragraph (b) of Rule 19 could be used. Said paragraph reads as follows:

> "(b) Where a court of appeals has rendered a decision in conflict with the decision of another court of appeals on the same matter; or has decided an important state or territorial question in a way in conflict with applicable state or territorial law; or has decided an important question of federal law which has not been, but should be, settled by this court; or has decided a federal question in a way in conflict with applicable decisions of this court; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this court's power of supervision."

Petitioners state what they consider is the rule for avoiding preferences in bankruptcy cases, but do not demonstrate in what way, if at all, the Court of Appeals rendered a decision in conflict with said rule. On the contrary, the Circuit Court in its Per Curiam opinion of March 12, 1975 specifically states:

> "Although appellants stress that the burden is on the Trustee to establish each of the elements of a voidable preference, our study of the record has convinced us that only the 'insolvency' and 'reasonable cause to believe' issues are substantial enough to merit discussion . . . It is true that July 31 is the relevant date as far as the mortgage is concerned, but there can be no doubt that, in the absence of evidence to the contrary, insolvency at the time of filing adequately supports the inference that the debtor corporations were insolvent one week earlier.
>
> "There was also adequate support for the conclusion

that at the time of the transfer appellants had reasonable cause to believe that the debtors were insolvent . . ." (see, Appendix "A"-2, Petition)

The Circuit Court actually applied the rule mentioned above and, after a study of the record of the case, affirmed the District Court and thus ruled against Petitioners. All this Honorable Court has before it now is a case which Petitioners lost because both the District Court and the Circuit Court applied a correct standard in conjunction with the evidence presented. This does not meet the requirements of Rule 19(b) (*supra*).

The Fifth Amendment to the Constitution of the United States does not require any formalistic type of hearing. This Honorable Court has so stated in the case of *NLRB* v. *Mackay Radio & Tel. Co.*, 304 U.S. 333 (1937) wherein at page 351 the Court said: "The Fifth Amendment guarantees no particular form of procedure; it protects substantial rights." Therefore, if the parties have had their right to be heard during the judicial proceeding, no specific type of hearing is necessary under the Fifth Amendment. "Due process does not, of course, require that the defendant in every civil case actually have a hearing on the merits . . . . What the Constitution does require is 'an *opportunity* . . . granted at a meaningful time and in a meaningful manner', *Armstrong* v. *Manzo*, 380 U.S. 545, 552 (1965) (emphasis added), 'for [a] hearing appropriate to the nature of the case', *Mullane* v. *Central Hanover Tr. Co., supra*, at 313. The formality and procedural requisites for the hearing can vary, depending upon the importance of the interests involved and the nature of the subsequent proceedings." *Boddie* v. *Connecticut*, 401 U.S. 371, 378 (1971). From the facts of this case, it is obvious that Respondents not only

had an opportunity to be heard throughout the proceeding, but actually participated in said proceeding in such a manner that they both in writing and by their actions accepted the facts for the District Court which put the said court in a position to rule on the legal question as to whether the credits held by Petitioners against Respondents were of a secured or an unsecured nature. An additional "hearing" would have only served the purpose of presenting the same evidence and the same facts to the District Court which had already been presented to it by the parties to the proceedings including Petitioners. This Court has said that "the opportunity to be heard must be tailored to the capacities and circumstances of those who are to be heard." *Goldberg* v. *Kelly,* 397 U.S. 254, 268-269 (1970). In the present case the Petitioners were represented by counsel and their acceptance of the facts used by the District Court was done through their counsel so that Petitioners were afforded full legal representation. Certainly the Fifth Amendment to the Constitution of the United States does not require any further rule in defense of Petitioners' rights. In the *Goldberg* case, *supra* at 267, this Court restated the following proposition: "The fundamental requisite of due process of law is the opportunity to be heard." and cited the case of *Grannis* v. *Ordean,* 234 U.S. 385, 394 (1914). The United States Court of Appeals for the First Circuit specifically found upon reviewing the evidence presented by Petitioners, who were appellants before that Court, that evidence to sustain all the requisites of an illegal preference under the Bankruptcy Act had been presented to the District Court. Contrary to Petitioners' allegations before this Honorable Court, neither the District Court nor the Court of Appeals used presumptions in order to decide the case at bar. What the District Court did was to take the evidence before it and infer results from the facts presented, which is exactly what the District

Court receiving evidence is supposed to do. Upon reviewing the District Court's action, the Circuit Court found that the former had acted correctly. A mere adverse final decision resulting from the facts proven in a particular case is not enough for the losing party to allege that the Court had not sufficient evidence before it to decide the case. This is exactly what Petitioners are trying to do before this Honorable Court in their argument based on the Federal Rules of Evidence. Said argument is completely inappropriate in the present case since Rule 301 of the Federal Rules of Evidence would not be applicable due to the fact that presumptions were not used either by the District Court nor by the Court of Appeals in the decision of the case.

For the foregoing reasons, the petition for certiorari should be denied.

Respectfully submitted,

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